

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
THE HAVASUPAI TRIBE)	File No. 0008189594
)	
For a New Educational Broadband Service Station)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 2019

Released: May 16, 2019

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On April 24, 2018, the Havasupai Tribe (the Havasupai or the Tribe) filed an application for permanent authorization to use four Educational Broadband Service (EBS) channels within a 35-mile geographic service area centered near Supai, Arizona.¹ In this *Memorandum Opinion and Order*, subject to certain conditions, we grant the application and necessary waivers.

II. BACKGROUND

2. *2500-2690 MHz Band Generally.* In developing regulatory policies in the 2500-2690 MHz band over the last several decades, the Commission has been cognizant of this band's potential to host a variety of services. In 1963, the Commission established the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band,² envisioning that it would be used for transmission of instructional material to accredited public and private schools, colleges and universities for the formal education of students.³ In 1983, in response to the demand for additional spectrum for delivery of video entertainment programming to subscribers, the Commission re-allotted eight ITFS channels (the E and F channel blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁴ In

¹ The application was filed with requests for waiver of the Commission's filing freeze on new EBS applications and of Section 1.913(b) of the Commission's rules to permit manual filing of the application. *See* The Havasupai Tribe: Application for Educational Broadband Service ("EBS") License, File No. 0008189594 (Application) and Request for Waiver (Waiver Request) (filed Apr. 24, 2018).

² *See Amendment of Parts 2 and 4 of the Commission's Rules and Regulations to Establish a New Class of Educational Television*, Report and Order, 39 FCC 846 (1963), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

³ *See Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems*, Report and Order, 48 Fed. Reg. 33873, 33875, para. 9 (1983) (1983 R&O) (citing *ETV Decision*, 39 FCC 846, 852-853, para 25).

⁴ *See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, Report and Order, 94 FCC 2d 1203 (1983) (*First Leasing Decision*).

conjunction with this re-allotment, the FCC permitted ITFS licensees to lease “excess capacity” on their facilities to commercial entities.⁵

3. In April 2003, the Commission proposed new technical rules and a new band plan for ITFS and MDS spectrum (changing the service names to EBS and Broadband Radio Service (BRS), respectively), and imposed a freeze on all applications for new BRS and EBS licenses.⁶ Subsequently, the Commission lifted the freeze on applications for new BRS licenses, but maintained it for applications for new EBS licenses.⁷ In June 2004, the Commission adopted new rules fundamentally restructuring the 2500-2690 MHz band, but left the EBS filing freeze in place.⁸ In 2008, the Commission sought comment on how to license unassigned EBS spectrum.⁹

4. Last year, the Commission issued a notice of proposed rulemaking proposing “to allow more efficient and effective use of [the 2.5 GHz] band by providing greater flexibility to current EBS licensees as well as providing new opportunities for additional entities to obtain unused 2.5 GHz spectrum to facilitate improved access to next generation wireless broadband.”¹⁰ In the proceeding, the Commission sought comment on establishing one or more local priority filing windows for unassigned 2.5 GHz spectrum, following which any remaining 2.5 GHz spectrum would be made available for flexible use via competitive bidding.¹¹ The Commission also sought comment on other approaches to rationalizing and opening the 2.5 GHz band for more productive and intensive use.¹²

5. *The Havasupai Tribe Application.* According to the Tribe’s waiver request, Arizona’s indigenous Havasu Baaja (known today as the “Havasupai”) are the traditional guardians of the Grand Canyon.¹³ The Havasupai Reservation, established in 1880 and enlarged in 1975, consists of 188,077 acres of plateau country, dissected by canyons characteristic of the Grand Canyon and Colorado River region.¹⁴ The village of Supai has been home to the Tribe for over 1,000 years.¹⁵ Because of its remote

⁵ *Id.* at 1206-07, para. 4.

⁶ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, 6811, para. 226, 6825, para. 260 (2003) (*NPRM and MO&O*).

⁷ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Second Memorandum Opinion and Order, 18 FCC Rcd 16848, para. 1 (2003) (*Second MO&O*).

⁸ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O and FNPRM*).

⁹ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling, 23 FCC Rcd 5992, 6060-68, paras. 180-204 (2008) (*Second FNPRM*).

¹⁰ *Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, 33 FCC Rcd 4687, 4687-88, para. 1 (2018) (*2.5 GHz NPRM*).

¹¹ *Id.* at 4695-4702, paras. 25-51.

¹² *Id.* at 4704-05, paras. 58-62.

location, all supplies must travel to the village by foot, horseback, or helicopter.¹⁶

6. On February 28, 2018, the Wireless Telecommunications Bureau granted the Tribe special temporary authority (STA) to use the four A group EBS channels in Supai to offer LTE broadband service.¹⁷ The Tribe states that the system deployed pursuant to this authority provides the only reliable high-speed wireless broadband in Supai.¹⁸ The Tribe activated the system days after grant of STA, and the system offers download speeds between 1.2 and 32 Mbps throughout the village.¹⁹ The Tribe has distributed broadband access equipment to its Early Head Start building and the homes of 12 teachers in the village, who use the system to obtain necessary training.²⁰ Current users of the system include a teacher obtaining a Master's degree, a Head Start worker obtaining required certification, and a tribal member working on an Associates' degree.²¹ In addition, the Tribe is distributing devices to K-12 students.²²

7. On April 24, 2018, the Tribe filed the instant Application, seeking permanent authority for the four A group EBS channels that it has been using under the STA, and asking for waiver of the EBS filing freeze and the electronic filing requirement of Section 1.913(b).²³ In its filing, the Tribe indicates that it will "use its EBS-based wireless broadband system solely for educational purposes, without leasing of excess capacity for commercial use."²⁴

8. With its Application, the Tribe provided letters of support from the Honorable Tom O'Halleran, Member of Congress; members of the Arizona state legislature; a member of the Coconino County Board of Supervisors; the President of Northern Arizona University; the Chairwoman and a member of the Havasupai Tribal Council; and Havasupai Head Start.²⁵ The Tribe's Application was listed on public notice as accepted for filing on May 2, 2018.²⁶ No petitions to deny or other oppositions were filed.

¹³ Waiver Request at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Waiver Request at 2.

¹⁷ Call Sign WRAT818, File Number 0007981254. The STA has been renewed twice (File Nos. 0008151270 and 0008429342), and currently expires on May 18, 2019.

¹⁸ Waiver Request at 3.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ *Id.* at 4-6.

²² *Id.* at 3.

²³ *Id.* at 1, 8. Section 1.913(b) of the Commission's Rules states in relevant part that "all applications and other filings using FCC Forms 601 through 608 or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS." 47 CFR § 1.913(b).

²⁴ *Id.*

²⁵ Application.

²⁶ See *Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing*, Report No. 13147, Public Notice, (rel. May 2, 2018) at 3.

III. DISCUSSION

9. As noted, the Tribe seeks both a waiver of the filing freeze on new EBS applications and a waiver of the electronic filing requirement for such applications contained in Section 1.913(b) of the Commission's rules, to provide it permanent authorization to use four A group EBS channels to operate an LTE network for the provision of broadband educational services.²⁷ The Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁸ As discussed below, we conclude that the Tribe has met the second prong of the waiver standard with respect to both of its requests, and accordingly, we grant its Waiver Request, subject to the conditions outlined below.

10. We conclude that application of the filing freeze would be inequitable and contrary to the public interest under the unique circumstances presented by the Havasupai. Without access to EBS spectrum, because of its isolated, remote geographic location, the Tribe faces substantial challenges to providing educational content to all of the members of its school community, including underserved students, faculty and administrators.²⁹ Given the urgent need for broadband service on the reservation, and the fact that denying the waiver would require the Tribe to turn off the service that its people have already come to rely on, we do not believe it is appropriate to ask the Tribe to wait until the Commission makes spectrum available pursuant to mechanisms that may be adopted in the 2.5 GHz proceeding. We therefore conclude that the Tribe has justified a waiver of the EBS filing freeze under the second prong of the waiver standard.

11. To ensure that grant of the requested waivers will produce the public interest benefits we anticipate, we will place three conditions on the waiver grant, all of which are consistent with conditions imposed on prior grants of waivers of the EBS filing freeze.³⁰ First, the Tribe's license shall include a condition that its Geographic Service Area (GSA) shall not include any area within the GSA of any previously licensed co-channel EBS station.³¹ Second, to ensure that the licensed spectrum is quickly put to use to serve a community that lacks broadband alternatives, and consistent with the Tribe's representations that it has rapidly deployed broadband service pursuant to the existing STA,³² we will require the Tribe to demonstrate substantial service pursuant to Section 27.14(o) of the Commission's

²⁷ Waiver Request at 1.

²⁸ 47 CFR § 1.925(b)(3).

²⁹ Waiver Request at 2-3.

³⁰ See, e.g., *Application of The Board of Trustees of Northern Michigan University For a New Educational Broadband Service Station*, Memorandum Opinion and Order, 23 FCC Rcd 11832 (WTB 2008); *Application of The Nisqually Indian Tribe*, Memorandum Opinion and Order, 28 FCC Rcd 15569 (WTB BD 2013); *The Board of Trustees of Northern Michigan University*, Memorandum Opinion and Order, 28 FCC Rcd 15576 (WTB BD 2013); *The Board of Trustees of Northern Michigan University*, Memorandum Opinion and Order, 28 FCC Rcd 15583 (WTB BD 2013); *Application of The Board of Trustees of Northern Michigan University For a New Educational Broadband Service Station*, Memorandum Opinion and Order, 31 FCC Rcd 3371 (WTB BD 2016).

³¹ The Tribe has not requested authorization for any EBS spectrum already authorized to another entity. Waiver Request at 10.

³² Waiver Request at 3.

Rules within two years from the date its license is granted by the Bureau.³³ Third, we adopt as a license condition the Tribe's voluntary commitment not to lease its spectrum.³⁴

12. With respect to the electronic filing requirement contained in Section 1.1913(b) of the Commission's Rules,³⁵ we observe that the Commission's electronic Universal Licensing System (ULS) currently is not configured to accept applications such as the one submitted by the Tribe. We therefore conclude that, in light of these circumstances, application of the rule would be inequitable and contrary to the public interest because it would be unfair to reject an application for failure to file electronically when electronic filing capability is not available. We therefore grant the Tribe a waiver to permit manual filing of its Application.

IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons discussed above, we grant the Tribe's requests for waiver of (1) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*, and, (2) the electronic filing requirement in Section 1.1913(b) of the Commission's Rules. We also direct the Broadband Division to process the Tribe's Application in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's rules.

14. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's Rules, 47 CFR § 1.925(b)(3), that the request for waiver of the filing freeze filed by The Havasupai Tribe in connection with File No. 0008189594 IS GRANTED.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 309 that the Broadband Division, Wireless Telecommunications Bureau SHALL PROCESS File No. 0008189594 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309 that the following conditions SHALL BE IMPOSED on any authorizations issued to the Havasupai Tribe as a result of the application it has filed:

The Geographic Service Area of this station shall not include any area within the GSA of any previously licensed co-channel EBS station.

The Havasupai Tribe shall demonstrate that it has met the substantial service requirement contained in 47 CFR § 27.14(o) within two years after the grant of their application.

³³ 47 CFR § 27.14(o).

³⁴ See Waiver Request at 1. We note that the 2.5 GHz NPRM proposed to eliminate restrictions on leasing imposed on licenses issued pursuant to a waiver of the filing freeze. 2.5 GHz NPRM, 33 FCC Rcd at 4694, para. 21. If the Commission ultimately adopts that proposal, this condition shall be null and void.

³⁵ See 47 CFR § 1.913(b).

The Havasupai Tribe shall not lease any spectrum associated with this license to another entity.

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Wireless Telecommunications Bureau